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VIA ELECTRONIC SUBMISSION

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-33-10

Dear Ms. Murphy:

Morgan, Lewis & Bockius LLP ("Morgan Lewis") appreciates the opportunity to submit comments in response to the Securities and Exchange Commission's ("Commission's") Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 ("Proposed Rules"), published on November 3, 2010, titled "Securities Whistleblower Incentives and Protection." These Proposed Rules were mandated by § 922(d)(1) of the Dodd-Frank Act, Pub. L. No. 111-203, § 922 (hereinafter "Dodd-Frank").

I. Introductory Statement

Our Firm understands both the goals of the Dodd-Frank legislation and the Commission's need to obtain quality information relating to violations of securities laws. We also understand the importance of protecting from retaliation whistleblowers who have brought such information to the Commission after exhausting appropriate channels within their own organizations. In its Proposed Rules, the Commission has made a thoughtful effort to provide employers, employees, and other affected parties with guidance on how best to achieve those goals. We believe, however, that there are three areas in which the Proposed Rules do not strike the appropriate balance:

First, the Commission's law enforcement mission is served by whistleblower information only if that information is credible. The task of enforcing federal securities laws is too important to be side tracked by frivolous claims in which the whistleblower lacks a reasonable belief that a potential violation of the securities laws has occurred, but instead has acted without consideration or purely from bias. The "reasonable belief" standard has worked well in the context of the Sarbanes-Oxley Act, Pub. L. No. 107-204 (July 30, 2002) (hereinafter "Sarbanes-Oxley"), and should be adopted here as well.

Second, we do not believe that the goals of the Dodd-Frank act are met by encouraging whistleblower claims by persons who themselves are culpable participants in the alleged wrongdoing. There are other mechanisms already in use by the Division of Enforcement to encourage those persons to come forward and cooperate with law enforcement. Stretching the whistleblower program to cover culpable actors is thus unnecessary. Perhaps more importantly, putting culpable actors under the anti-retaliation umbrella will make it difficult, if not impossible, for companies to discipline wrongdoers within their organizations. Such an outcome would be both unfair to those companies and profoundly inconsistent with the protection of investors.

Third, we are concerned that the proposed rules threaten to degrade the self-policing mechanisms that many companies have developed on their own and that all public companies have adopted following the passage of Sarbanes-Oxley. Those internal reporting mechanisms are critical to fostering a culture of compliance within an organization, and they should not be undermined by a whistleblower program that provides monetary incentives to not use them. We make several suggestions below on how better to avoid that unfortunate outcome.

We view these three areas as the most important elements of the Proposed Rules, but would welcome the opportunity to speak with the Commission in further detail regarding other aspects of the Proposed Rules, or regarding any question that the Commission might have regarding the comments presented here.

II. Comments

A. A "Whistleblower" Is A Person Who Has A Reasonable Belief That A Violation of the Securities Laws Has Occurred.

Properly defining and limiting those individuals who can be a "whistleblower" will be critical to preserving the Commission's resources and maintaining the quality of the Commission's enforcement initiatives. Section 922(a)(6) of Dodd-Frank defines a whistleblower as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." Pub. L. No. 111-203, § 922(a)(6).

The Dodd-Frank legislation limits the definition of "whistleblower" to one who provides information to the Commission relating to a violation of the securities laws. Id. In Proposed Rule 21F-2, the Commission proposes that the definition be broadened to include "an individual who, alone or jointly with others, provides information to the Commission relating to a *potential* violation of the securities laws." Proposed Rules at 6 (emphasis added). The Commission then states that the word "potential" is necessary because protection should not depend on "an ultimate adjudication, finding or conclusion that conduct identified by the whistleblower constituted a violation of the securities laws." Id. at 7.

We understand the Commission's practical concern with being able to determine who is a protected whistleblower without an ultimate adjudication of whether an actual violation has occurred. We do not believe, however, that the inclusion of the word *potential*, by itself, creates a sufficient standard to both remain faithful to the statute and prevent the submission of frivolous claims.

In the anti-retaliation provisions of Sarbanes-Oxley, 18 U.S.C. § 1514(A), Congress provided that a whistleblower must "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee ***reasonably believes*** constitutes a violation" of the securities laws. 18 U.S.C. §1514(A)(a)(1) (emphasis added). In other words, a whistleblower under Sarbanes-Oxley does not need to establish an actual violation to be protected from the anti-retaliation provisions, so long as the whistleblower has a reasonable belief that such a violation has occurred.

Numerous courts across the country have found this reasonable belief standard to require "both a subjective belief and an objectively reasonable belief that the conduct [the whistleblower] complained of constituted a violation of relevant law." Welch v. Chao, 536 F.3d 269, 275 (4th Cir. 2008); see also Day v. Staples, 555 F.3d 42, 55 (1st Cir. 2009); Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1000 (9th Cir. 2009). Moreover, this interpretation is supported in the legislative history of Sarbanes-Oxley. See S. Rep. No. 107-146, at 19 (2002) ("[S]ubsection (a)(1) . . . is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts.").

A requirement for both a subjective belief and an objectively reasonable belief is also appropriate for whistleblowers under Dodd-Frank. Requiring potential whistleblowers to reasonably believe that the conduct they are reporting is an actual violation of securities laws discourages frivolous, speculative, retaliatory, or bad faith submissions to the Commission. This standard has been employed successfully under Sarbanes-Oxley, and a consistent application is also warranted here.[1] We encourage the Commission to consider the "reasonable belief" standard in its final promulgation of the Rules.

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1 Although the Government Accountability Office ("GAO") recently has criticized the efficacy of the Department of Labor's investigation of whistleblower claims brought under the anti-retaliation provisions of Sarbanes-Oxley, the issues reported did not relate to the language of the statute, but rather to the lack of resources and training of the organization. See Whistleblower Protection: Sustained Management Attention Needed to Address Long-standing Program Weaknesses, GAO-10-722 (August 17, 2010) (finding that the Occupational Safety and Health Administration ("OSHA") has not mandated training for whistleblower investigators, has not given investigators the equipment necessary for effective investigation, and has not adopted internal controls and compliance measures to ensure that the program operates as . . .

B. Culpable Conduct By The Whistleblower Should Not Be Rewarded, Nor Should The Conduct Otherwise Be Protected From Discipline.

Just this year, the Commission's Division of Enforcement promulgated Cooperation Guidelines that are explicitly aimed at convincing culpable participants in securities law violations to turn themselves (and their confederates) in to the Division in exchange for leniency in prosecution.[2] We submit that this program - and not Dodd-Frank's whistleblower-bounty regime - is the appropriate way to incentivize culpable actors to cooperate with law enforcement. Permitting culpable whistleblowers not only to profit from their misconduct but also to be rewarded, under the anti-retaliation provisions, with lifetime job tenure is unfair to employers and is profoundly inconsistent with the protection of investors. The only concession to this principle in the Commission's proposed rules is the statement that "the Commission will not count any monetary sanctions that the whistleblower is ordered to pay . . . [and] the Commission will not add those amounts to the total monetary sanctions collected in the action for purposes of calculating any payment to the culpable individual." Proposed Rules at 83. This provision of the Proposed Rules is, at most, designed to prevent whistleblowers from "*financially* benefiting by, in essence, blowing the whistle on their own misconduct." Id. (emphasis added). Responding to the Commission's request, at Proposed Rules 8 and 84, for comment on whether whistleblowers may benefit from their own culpable conduct, we submit that the Commission's proposal is insufficient to deal with the problem.

Morgan Lewis certainly agrees that a whistleblower should not benefit financially from his or her misconduct. However, it is equally important that a culpable whistleblower not be protected from appropriate employer discipline. An employer has a right to discipline or terminate an employee who has engaged in job-related misconduct. Allowing an employee to report his or her misconduct to the Commission (perhaps during a pending internal investigation into that same misconduct) and then subsequently claim whistleblower protection from discipline or termination turns the intent of the whistleblower protections on its head. The Commission has an interest in effective employer discipline for employees who engage in misconduct relating to compliance issues. Investors have an interest in having those employees removed from positions in which they can do further harm. Accordingly, it would be far more appropriate to define a whistleblower in the first instance as an individual who provides information about a violation *"by another person,"* as suggested in Request for Comment 1. Proposed Rules at 8 (emphasis

. . . intended). Indeed, although Dodd-Frank amended the anti-retaliation provisions of Sarbanes-Oxley to broaden their application (for example, by applying them to certain subsidiaries and affiliates, and lengthening the statute of limitations), Congress retained the reasonable belief standard. Given that resources also are not limitless at the Commission, the reasonable belief standard will help to reduce frivolous claims.

2 See "SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations," Press Release No. 2010-6 (Jan. 13, 2010).

added). This definition would simultaneously ensure that culpable employees are not rewarded financially for their own misconduct, and permit employers to take appropriate disciplinary action against those employees.

C. The Importance Of Robust Internal Compliance Mechanisms.

In passing Sarbanes-Oxley, Congress recognized the central importance of internal mechanisms for reporting misconduct. We appreciate the Commission's willingness to consider the tension that will be created if whistleblowers are permitted to report to the Commission in the first instance, bypassing these internal compliance mechanisms.

As the courts of appeals have recognized, Sarbanes-Oxley was designed to strengthen internal compliance mechanisms in public companies and ensure that such mechanisms are appropriately administered. For example, the Second Circuit noted that "SOX, and regulations promulgated thereunder, require corporate officers to report on the effectiveness of internal controls over financial reporting, and they prohibit those officers from characterizing the controls as 'effective' if 'there are one or more material weaknesses.'" Guyden v. Aetna, 544 F.3d 376, 379 (2d Cir. 2008) (quoting 17 C.F.R. § 229.308(a)(3)); see also Zucco Partners, LLC v. Digimarc Corp., 2009 U.S. App. LEXIS 7025, at *52 (9th Cir. 2009). Specifically, Section 301 of Sarbanes-Oxley requires that the audit committees of all public companies address internal complaints regarding all matters relating to internal compliance. 107 Pub. L. No. 204, Title III, § 301. These audit committees serve to detect, investigate, and remedy internal compliance matters within companies.

Corporate internal compliance programs are undermined if whistleblowers are given incentives - and large ones, at that - to forgo them and report their concerns directly to the Commission. Instead, the Commission should mandate that individuals report their information through their companies' internal reporting channels or audit committees, if available, in order for individuals to qualify as whistleblowers. Once an individual has reported the alleged misconduct internally, the employee should be required to wait a period of 180 days to permit the company to investigate the alleged misconduct properly, and address it. In most cases, a period of 180 days is both necessary and sufficient for the company to conduct a thorough internal investigation, vet the results to key stakeholders, and make important decisions as to whether to (1) self-report to the Commission, (2) remedy the underlying conduct internally, or (3) communicate to the whistleblower that no violation has occurred.

In addition, in the case of so-called "C-Level employees" (e.g., Chief Executive Officer, Chief Financial Officer, Chief Compliance Officer), these same concepts mandating internal reporting should apply. Just as certain employees responsible for internal compliance (such as legal counsel, compliance officers, and audit staff) are required under the Proposed Rules to utilize internal reporting and compliance systems before reporting to the Commission (see Proposed Rule 21F-4(b)(4) and (b)(7); Proposed Rules at 4, 12, and 23-24), C-Level employees have an even higher duty and responsibility to their companies and should be required to take advantage of their unique access to the Board of Directors of the company. Although C-Level employees would have the option to vet information and concerns through established internal reporting and compliance systems, situations could exist where the information is more properly suited for the Board of Directors. Given the important roles these officers play in an organization, we believe it would be counterproductive for such officers to go to the Commission without first informing the Board and providing the Board with an opportunity to take appropriate action.

In short, since the enactment of Sarbanes-Oxley, companies have gone to significant effort and expense to design, create, and institute robust internal audit committees and compliance systems. Individual whistleblowers should not be encouraged to circumvent these important internal mechanisms because the incentives tied to an SEC award are too alluring. Otherwise, these rules will have effectively superseded the Congressionally mandated internal audit committees that Sarbanes-Oxley specifically requires, and the Commission will have lost the benefit of significant assistance as it attempts to accomplish its mission with limited resources.

III. Conclusion

Again, we appreciate the opportunity to submit comments on the Commission's proposed regulations, and we thank the Commission in advance for its time and attention in this matter.

Sincerely,

Morgan, Lewis & Bockius LLP